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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 76

JESSIE WILLIAM MILLER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

PETITION FOR RECONSIDERATION.

HOWARD C. WESTWOOD,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 76

JESSIE WILLIAM MILLER,

vs. *Petitioner,*

THE UNITED STATES OF AMERICA.

PETITION FOR RECONSIDERATION.

The Petitioner respectfully requests reconsideration of the Court's decision in this case rendered on December 7, 1942. The opinion as originally announced was amended by order dated December 14, 1942.

I.

Introduction.

The Court has properly held that this case should be remanded with instructions to the Circuit Court of Appeals to permit the settlement of a bill of exceptions in the District Court which will present the question whether the evidence supports the verdict. The Court did not hold, however, that lower courts have the power to order that a transcript of all the evidence, or pertinent parts thereof, be prepared at public expense for use in making up a bill

of exceptions for a pauper's appeal in a criminal case. The Petitioner urges that the lower courts have such power, to be exercised, in the interest of justice, where the circumstances justify, and that this Court, for reasons hereafter set forth, should recognize such power in remanding this case.

II.

This Court Should Determine Whether A Trial Court Has the Inherent Power to Provide A Transcript.

The opinion states that it is unnecessary to decide whether a District Court has inherent power to order the preparation of a transcript. This view is taken since the Respondent has represented that the court reporter is ready to read his notes into a dictaphone and to make the dictaphone records available to the Petitioner without charge. The opinion concludes that, therefore, it would seem possible to prepare an adequate bill of exceptions without a transcript.

A. Probable Difficulties in Preparing a Bill of Exceptions without a Transcript Make it Appropriate to Recognize the Power to Provide a Transcript.

There are circumstances here which indicate probable difficulties to be encountered in preparing a bill of exceptions even with the aid which the Respondent has assured. These circumstances are so important that, if the District Court has the inherent power to provide a transcript, it is most desirable that this Court point out the extent of that power before the case is returned.

The question to be at issue is the sufficiency of all the evidence to show a crime involving elements that require an appraisal of the intent of the petitioner, of his wife, of his wife's daughter, and the effect of an atmosphere surrounding their conduct and the conduct of the daughter's

husband over an extended period of time three years ago at a number of different places in Arkansas and Texas (R. 6-8).

The trial lasted for seven days (R. 14). Many of the witnesses were uneducated people who did not speak with the polish of persons more fortunately situated (R. 26). It is most likely that to translate their peculiar idiom into a narrative will fall prejudicially short of reproducing for appellate scrutiny the exact bearing of their testimony upon the very human elements which must be weighed in determining whether there was sufficient proof of the crime alleged in this case.

The trial, moreover, occurred two years ago, in February, 1941.

The trial judge, it is said, "is one of the hardest worked Judges in the United States". See Appendix to Respondent's Brief, at p. 59. His present recollection of evidence two years old cannot be very clear.

Furthermore, there is a serious question whether the district attorney will give impartial assistance. His letter to the Attorney General appearing in the appendix to the Respondent's Brief shows bitter *personal* antagonism to the Petitioner. He states that the Petitioner is a "scoundrel" and

> "is a brute of the lowest type and lacks every human sensibility. * * *
>
> "* * * if any convict in a Federal penitentiary can on his sole unsupported statement and without even the concurrence of the lawyers who represented him at his trial, cause the United States to go to all the trouble and expense merely to keep him in the penitentiary that Miller has caused the government in this case, then the whole system by which and under which prisoners are condemned needs to be drastically overhauled and improved." See Appendix to Respondent's Brief, at pp. 59, 61.

These intemperate statements, which are not accurate in their inference as to the attitude of the Petitioner's trial counsel, and which upbraid the P itioner for doing nothing more than to request the trial judge to reduce his sentence (a request which the judge granted) and to ask for his right to appellate review (a right which the Respondent here has admitted and which this Court has protected), show that the district attorney is not likely to be cooperative.

Likewise, it must be kept in mind that there is no counsel representing the Petitioner in the lower courts. The Petitioner had to take the case into his own hands in making the application to the Circuit Court of Appeals for a bill of exceptions. It may be that counsel who represented him at the trial will not agree to resume responsibility. (Compare R. 28-29.) Entirely new counsel may, therefore, have to be appointed, as happened in this Court.

Finally, the Petitioner is in Leavenworth. He has been there ever since shortly after his conviction and before that he was in jail. Hence for two years he has been subject to prison censorship and to the consequent difficulties of keeping in touch with the witnesses. (Compare R. 26.) Moreover, he is a man of very rudimentary education and limited background. See Appendix B to Petitioner's Brief. Hence he will hardly have either the capacity or the freedom to prepare a bill himself—even with the aid of dictaphone records—or to be of effective assistance to such counsel as may be appointed.

In these circumstances, if a trial court has the inherent power to require that a transcript of at least portions of the testimony be provided at public expense, it is quite likely that the lower courts would find it proper to make such provision in this case. Otherwise a burden of work and expense will fall upon some appointed counsel, the trial judge

and the district attorney out of all proportion to the cost of such transcription.

B. Applicable Court Rules Permit Setting Forth Evidence in Full in Bill of Exceptions.

The applicable Rule of Court provides that evidence embraced in a bill of exceptions

> "may be set forth in full or in condensed and narrative form."[1]

In other words, there is no longer the requirement of—or even a preference for—a narrative statement.

C. There Is an Appropriation Available to Pay for a Transcript.

The only further reason appearing in the opinion for not passing upon the question of a trial court's inherent power to order a transcript is the following statement in point 3 at page 4 of the opinion:

> "The respondent points out that the Comptroller General has ruled that there is no appropriation from which such expense may be paid and, whether he is or is not right, it remains that no appropriation is available without authorization of payment by the Attorney General. That officer appears unwilling to test the matter by making such authorization."

This conclusion, it is submitted, should be reconsidered. In the first place, the ruling of the Comptroller General referred to did not consider the question of the availability of an appropriation were it to be held that a trial court has the inherent power which we have urged. Rather, that ruling relies on *United States* v. *Fair*, 235 Fed. 1015 (N. D.

[1] See Rule 8 of this Court, which is made applicable to the preparation of bills of exceptions by Rule 9 of the Rules of Criminal Procedure after Verdict.

Calif., 1916), which in turn construes the proviso in section 5 of the Act of 1892, as amended in 1910, to be a prohibition against the United States' paying any expense to aid a pauper in a criminal case. As shown in the Petitioner's Brief at pp. 37-40, this reasoning is fallacious. Nor has this Court, in its opinion, construed the proviso in section 5 of the Act to have the effect attributed to it in the *Fair* case.

The fact of the matter is that there is every reason to believe that the Comptroller General would rule that the appropriation for miscellaneous expenses of the United States Courts would be available to meet expenses involved in the exercise of a court's inherent power. The Comptroller of the Treasury ruled, prior to the 1910 amendment to the Act of 1892, that such appropriation was available to pay the cost of printing the record for a pauper criminal defendant. 1 Comp. Dec. 29 (1894); see Petitioner's Brief, p. 30, n. 1. And after the 1910 amendment he recognized that, but for the alleged prohibition in the proviso in section 5 of the Act, the prior ruling would remain a controlling precedent. See 26 Comp. Dec. 362 (1919). Furthermore, there is now a specific item in the appropriation for miscellaneous expenses covering "stenographic reporting service". See Petitioner's Brief, at pp. 52-53.

In the second place, the statement that "no appropriation is available without authorization of payment by the Attorney General" overlooks the fact that the entire appropriation for miscellaneous expenses of the United States Courts is now administered by the Director of the Administrative Office of the United States Courts. This is specifically provided in the appropriation act.[2] *The Attorney General no*

[2] The current appropriation will be found in Public No. 664, 77th Cong., 2d. Sess., c. 472, Title IV.

longer has anything to do with such appropriations. Nor has the Respondent made any contention that the Attorney General has the power to supervise the expenditure of this appropriation.

We are advised by the Administrative Office that the appropriation for miscellaneous expenses has been used for a variety of purposes, ranging all the way from repairing oil paintings to paying the cost of psychiatric examinations of criminal defendants. And, as pointed out in the Petitioner's Reply Brief, at p. 8, that appropriation has likewise been held available to pay for taking and transcribing the deposition of a witness for a pauper defendant in a criminal case within the territorial limits fixed by 28 U. S. C. A. §656, and for the services of a pauper defendant's expert witness in a criminal case. 21 Comp. Gen. 347 (1941); *United States* v. *Fox,* 19 F. Supp. 463 (S. D. N. Y., 1937).

We are likewise advised by the Administrative Office that the specific item in the appropriation act for "stenographic reporting services" has covered stenographic services for such diverse purposes as disbarment proceedings, contempt proceedings, judicial conferences, and an investigation to determine whether an emergency still exists under the agricultural compositions and extensions sections of the Bankruptcy Act. 11 U. S. C. A. §203 (s) (6).

In short, there really can be no serious question about the availability of an appropriation if it is held that the courts have the inherent power to lend aid to a pauper.

Consequently, it is submitted that the statements in the Court's opinion on this subject should be reconsidered, and that the Court should pass upon the question of the inherent power, in the interest of justice, to order preparation of a transcript.

III.

The Decision That the Act of 1892 Does Not Permit the Provision of a Transcript Should Be Reconsidered.

In point 2 at page 4 of the opinion it is concluded that the Act of July 20, 1892, as amended, "applies only to court costs" and that the Judge's secretary who reported the trial in this case "is not an officer of the United States in his capacity as reporter * * * and his compensation cannot be treated as costs."

It is submitted that these conclusions should be reconsidered.

So far as the status of the reporter in this case is concerned the record shows that he is the official court reporter. Thus the Government's answer to the Petitioner's Petition for Rehearing in the Circuit Court of Appeals states that the secretary is the

> "Official Court Reporter for the Texarkana Division of the U. S. District Court for the Western District of Arkansas" (R. 18; see also R. 14).

And the reporter's certification on the bill of exceptions settled by the trial judge provided:

> "I, John T. Williams, hereby certify that I am the Official Reporter for the United States District Court, Western District of Arkansas, and that as such Reporter I attended the trial of the cause * * *
> "Witness my hand as such Official Reporter on this the 6th day of March, 1941.
> "John T. Williams, Official Reporter" (R. 38).

So far as compensation to a reporter being treated as costs is concerned, that is frequently done in civil cases. Indeed, Rule 80 of the Rules of Civil Procedure specifically provides for such treatment. Such treatment has the sanc-

tion of long standing judicial decision. *Ex parte Peterson*, 253 U. S. 300, 317 (1920); *In re Borok*, 50 F. (2d) 75, 78 (C. C. A. 2, 1931); *Corporation of St. Anthony v. Houlihan*, 184 Fed. 252, 255 (C. C. A. 1, 1910); *cf. Guardian Trust Co. v. Kansas City So. Ry. Co.*, 28 F. (2d) 233, 242 (C. C. A. 8, 1928).

If a reporter's compensation may be taxed as costs in a civil case—despite the absence of a statute providing therefor—no reason is perceived that such compensation can not be treated as costs in a criminal case.

IV.

The Provision of Rule 7 of the Criminal Rules Should Be Invited to the Attention of the Lower Courts.

In point 5 on page 6 of the opinion the Court has set forth the steps to be taken upon a remand of the case. This passage of the opinion does not, however, refer to the effect to be given to Rule 7 of the Rules of Criminal Procedure after Verdict. That Rule provides:

> "The clerk of the trial court shall immediately notify the trial judge of the filing of the notice of appeal, and thereupon the trial judge shall at once direct the appellant or his attorney, and the United States Attorney, to appear before him and shall give such directions as may be appropriate with respect to the preparation of the record on appeal, including directions for the purpose of making promptly available all necessary transcripts of testimony and proceedings . . ."

This Rule has been judicially interpreted only once, so far as we can find. That was in *Boykin* v. *Huff*, 121 F. (2d) 865, 873 (App. D. C., 1941), where the court held that the Rule places the initiative on the trial judge and the clerk. See discussion in Petitioner's Brief, at pp. 15-16.

In view of this Petitioner's situation, the obstacles he has encountered and the difficulties which he still must face,

and in view of the fact that the steps called for by Rule 7 apparently were not taken in this case, it is submitted that it would be appropriate for this Court to invite the lower courts' attention to Rule 7 and to the affirmative duty of the trial court which that Rule implies.

The blunt fact is that this Petitioner needs help which he has not heretofore received from anyone. The Respondent has argued in its Brief, at pp. 22-23, that Rule 7 means merely that after a bill of exceptions is presented, the trial judge is to give assistance. Any such limited effect largely deprives Rule 7 of significant meaning. The Rule must mean something; and where a defendant is a pauper, uneducated, in the penitentiary and without counsel in the lower courts, it should mean a good deal.

VI.

Conclusion.

It is therefore respectfully submitted that this Petition should be granted, that the Court's opinion of December 7, 1942, as amended, should be reconsidered in the respects indicated, and that this Court should decide that, to the extent appropriate in the interest of justice, a transcript of the evidence in this case can be furnished to the Petitioner at public expense.

HOWARD C. WESTWOOD,
CHARLES M. DAVISON, JR.,
Attorneys for Petitioner.

Dec. 30, 1942.

I, Howard C. Westwood, attorney for Petitioner, hereby certify that the foregoing petition for reconsideration is presented in good faith and not for delay.

HOWARD C. WESTWOOD.

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SUPREME COURT OF THE UNITED STATES.

No. 76.—October Term, 1942.

Jessie William Miller, Petitioner, vs. The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[December 7, 1942.]

Mr. Justice Roberts delivered the opinion of the Court.

This case presents important questions in respect of criminal proceedings against poor persons in federal courts. For this reason we granted certiorari.

The petitioner was indicted, tried, and convicted in the United States District Court for Western Arkansas for kidnapping in violation of Title 18 U. S. Code §408a. As he was without funds to conduct his defense, the court appointed counsel for him. The person charged to have been kidnapped was the illegitimate daughter of petitioner's wife.

Two defenses were presented. The first was that the petitioner came within the exception stated in the statute, that it shall not apply to a kidnapping "in the case of a minor, by a parent thereof". To sustain this defense petitioner offered evidence to prove that the girl was a minor and that, having married her mother, he stood in the relation of a parent to her. The second defense was that the petitioner had neither taken nor detained the young woman against her will. The District Judge ruled against the petitioner's contention that he was a parent within the intendment of the statute, but sent the case to the jury on the question whether he had apprehended or detained his wife's daughter against her will. The jury rendered a verdict of guilty. Judgment of sentence was entered.

In due time petitioner's counsel filed notice of appeal in which, amongst others, reasons advanced were that the court erred in refusing peremptory instructions for acquittal at the conclusion of the Government's case and at the conclusion of all the evidence; that the verdict of the jury was contrary to the weight of the

evidence, and that the court erred in refusing to instruct the jury that if they found the complaining witness was under the age of eighteen years at the time of the kidnapping they must find the petitioner not guilty.

The District Court entered an order permitting the petitioner to appeal *in forma pauperis* and the Circuit Court of Appeals also permitted the prosecution of the proceedings in that court *in forma pauperis*.

In connection with the appeal, errors were specifically assigned to the ruling of the District Court respecting the status of the petitioner as a parent, but no error was so assigned to the action of the court in submitting the fact questions respecting the alleged apprehension and detention of the complaining witness, although the assignments of error concluded with a prayer for a reversal for "other manifest errors in the record and proceedings". The Bill of Exceptions allowed by the District Court set forth only so much of the proceedings as went to the question of petitioner's asserted parenthood of the alleged minor. It also included the proceedings on motions for directed verdict and the action of the court upon those motions but none of the evidence on which the motions were based.

The Circuit Court of Appeals affirmed the judgment and, in so doing, dealt only with the question of the petitioner's parenthood.[1] At the close of its opinion it stated: "No other question having been raised on this appeal, it follows that the judgment must be and is affirmed."

The petitioner entered upon service of his sentence and, being without counsel, personally forwarded to the Circuit Court of Appeals a petition for the appointment of counsel and a petition for rehearing. In the latter he urged that there was no testimony in the record indicating that he took or detained his wife's daughter against her will, and prayed that the Circuit Court of Appeals issue a writ of certiorari to bring up a complete transcript of the testimony taken at his trial. In a *per curiam* opinion,[2] the court stated that it had decided the only question before it, but ordered that the United States Attorney answer the petition so that it might be ascertained whether a Bill of Exceptions could be prepared to raise the questions which the petitioner desired to have

[1] 123 F. 2d 715.
[2] 124 F. 2d 849.

decided. The prosecuting officer answered alleging that the entire testimony in the case had been taken stenographically by the district judge's secretary, whose notes were available and could be transcribed; that parts of the testimony had been taken by a stenographer who sat at the defendant's counsel table and that, upon inspection, it was found that the notes of the latter were incomplete and inaccurate and the United States Attorney was unwilling to have them used as the basis of a Bill of Exceptions. The answer further set forth that the judge's secretary had important duties to perform; that the testimony which he took stenographically was of large volume; that its transcription would involve labor for which he ought to be paid; and that the Government could not be required to pay for a transcript of the evidence or to furnish such a transcript to the defendant.

To this answer the petitioner filed a response in which, amongst other things, he alleged that he had repeatedly urged his attorney to present to the Circuit Court of Appeals the question of the sufficiency of the evidence to sustain his conviction and that his attorney had invariably replied that this could not be done without obtaining a transcript of the evidence so as to make a proper Bill of Exceptions covering the subject; that the attorney further advised him that a transcript of the testimony could not be procured because the petitioner had no funds to pay for its preparation. It stands admitted on the record that these are the facts.

The Circuit Court of Appeals, in a third opinion,[3] stated that it had requested a response to the petition for rehearing in order to ascertain whether the Government, as in *Holmes* v. *United States*, 314 U. S. 583, would consent to the vacation of the judgment so that a proper record might be made as the basis for consideration of the question urged by the petitioner. The court stated that, in view of the Government's opposition to a vacation of the judgment or a reopening of the case, it felt itself without power to act further in the matter and indicated that if the petitioner desired to bring the cause to this court such facilities should be furnished him as were necessary to that end without the obligation to pay fees or costs.

The petitioner presented to this Court a petition for certiorari and a petition for leave to proceed *in forma pauperis*. We granted the writ and gave leave to proceed *in forma pauperis*. As he

[3] 126 F. 2d 462.

was without counsel we appointed counsel to act for him in this Court.

1. There is no law of the United States creating the position of official court stenographer and none requiring the stenographic report of any case, civil or criminal, and there is none providing for payment for the services of a stenographer in reporting judicial proceedings. The practice has been for the parties to agree that a designated person shall so report. The one selected must be paid by private arrangement with one or more of the parties to the litigation. The amount paid to him is not costs in the cause nor taxable as such against any of the parties.

2. At the instance of the Conference of Senior Circuit Judges, legislation has been introduced in Congress to provide an official system of reporting and to defray the cost of it. That legislation, as we understand, will, if adopted, obviate the difficulties presented in this case. As the matter stands, however, it is clear that the judge's secretary who stenographically reported the trial is not an officer of the United States in his capacity as reporter, is not entitled to fees from the United States for his services, and his compensation cannot be treated as costs. The Act of July 20, 1892, as amended,[4] applies only to court costs, permits the taking of an appeal without prepayment of cost of printing the record in the appellate court, and provides in certain cases for the printing of that record at Government expense. It does not authorize the procurement of a transcript of the testimony nor the payment for services in reporting evidence taken at the trial nor for the obtaining of it by the Government in behalf of an indigent defendant.

3. It is urged by the petitioner that the District Court has inherent power, in the interests of justice, to order preparation of a transcript for the petitioner's use in making up a bill of exceptions and to impose the expense of so doing upon the Government. The respondent points out that the Comptroller General has ruled that there is no appropriation from which such expense may be paid[5] and, whether he is or is not right, it remains that no appropriation is available without authorization of payment by the Attorney General. That officer appears unwilling to test the matter by making such authorization. We need not

[4] 28 U. S. C. § 832.

[5] 9 Comp. Gen. 503; cf. 21 Comp. Gen. 347.

stop to consider these opposing views because of the facts developed in the briefs and in argument.

4. As we have said, ~~a stenographer, on behalf of the defendant, took notes of much of the testimony given at the trial. The United States Attorney asserted in his answer to the petition for rehearing that her notes proved so inaccurate that they could not be made the basis of a proper bill of exceptions. But this is not to say they are utterly useless, when corrected, as the basis for a bill. In addition~~, the trial judge's secretary took stenographic notes of the entire testimony and his notes are available. It was stated at the bar that this gentleman stands ready to read his notes into a dictaphone without charge to the petitioner. In the light of these facts it would seem that it is possible to prepare an adequate bill of exceptions fairly reflecting the purport of the testimony.

It has become the usual, because the more convenient, method to prepare a bill of exceptions by the use of a stenographic transcript of the evidence. Even so, the bill ought not to contain all of the evidence but only that which is relevant to the issues made upon the appeal and often it is expedient and satisfactory to summarize the evidence and transmute it into narrative form. Historically a bill of exceptions does not embody a verbatim transcript of the evidence but, on the contrary, a statement with respect to the evidence adequate to present the contentions made in the appellate court. Such a bill may be prepared from notes kept by counsel, from the judge's notes, from the recollection of witnesses as to what occurred at the trial, and, in short, from any and all sources which will contribute to a veracious account of the trial judge's action and the basis on which his ruling was invoked.

Counsel in this case could, therefore, have prepared and presented to the trial judge, as was his duty, a bill of exceptions so prepared, and it would then have become the duty of the trial judge to approve it, if accurate, or, if not, to assist in making it accurately reflect the trial proceedings. ~~We are urged to hold that, in view of counsel's failure so to do, petitioner is now foreclosed~~. We are unwilling ~~as to rule~~, in the circumstances of this case. Petitioner repeatedly insisted that counsel procure a proper record on appeal to present the question of the sufficiency of the evidence to sustain his conviction. The petitioner

hold that the petitioner is foreclosed from obtaining a bill

did everything that lay within his power to obtain such a proper record, and we think he should not be penalized for the failure of his appointed counsel to take the necessary measures, if the power exists to afford him a hearing on the point he deems material.

5. We are of opinion that the Circuit Court of Appeals had power in the circumstances to remand the cause for the settlement of a proper bill of exceptions. Rule 4 of the Criminal Appeals' Rules[6] provides that, after the filing of the notice of appeal, the appellate court shall have supervision of the proceedings on appeal including the proceedings relating to the preparation of the record on appeal, and that it may entertain a motion for directions to the trial court. This power extends to the procurement of a proper bill of exceptions[7] and ought to be liberally exercised where the contention is that the evidence is insufficient to support the verdict.[8]

We think the right course in this instance is to remand the cause to the Circuit Court of Appeals in order that it may enter an order permitting the settlement of a bill of exceptions in the District Court to present the point urged by petitioner. Upon the entry of such an order it will be the duty of counsel for petitioner to present a bill made up from the best sources available. It will then become the duty of the district judge to assist in amplifying, correcting, and perfecting this bill from such sources, and to settle the same in order to present the evidence given at the trial. From such a bill the Circuit Court of Appeals will no doubt be able to decide whether there was evidence to sustain petitioner's conviction.

So ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[6] 18 U. S. C. A. § 688ff.

[7] Ray v. United States, 301 U. S. 158, 164, 167; Holmes v. United States, 314 U. S. 583.

[8] Hemphill v. United States, 312 U. S. 657.